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EXCEPT AS AUTHORIZED BY APPLICABLE RULES.  
See Ariz. R. Supreme Court 111(c); ARCAP 28(c),  
Ariz. R. Crim. P. 31.24



DIVISION ONE  
FILED: 03/15/11  
RUTH WILLINGHAM,  
ACTING CLERK  
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IN THE COURT OF APPEALS  
STATE OF ARIZONA  
DIVISION ONE

SCOTT A. NEHER,	)	1 CA-IC 10-0035
	)	
Petitioner,	)	DEPARTMENT D
	)	
v.	)	MEMORANDUM DECISION
	)	
THE INDUSTRIAL COMMISSION OF ARIZONA,	)	(Not for Publication -
	)	Rule 28, Arizona Rules
Respondent,	)	of Civil Appellate
	)	Procedure)
GOTHAM INSTALLATION, INC., ATLANTA,	)	
	)	
Respondent Employer,	)	
	)	
NEW HAMPSHIRE INSURANCE COMPANY	)	
c/o CHARTIS CLAIMS, INC.,	)	
	)	
Respondent Carrier.	)	
	)	

Special Action - Industrial Commission

ICA Claim No. 20092250280

Carrier Claim No. 709-776061

Administrative Law Judge Margaret A. Fraser

**AWARD AFFIRMED**

Crossman Law Offices, P.C.  
By Avery N. Crossman  
Attorneys for Petitioner Employee

Phoenix

Andrew Wade, Chief Counsel  
The Industrial Commission of Arizona  
Attorney for Respondent

Phoenix

**N O R R I S**, Judge

¶1 This special action arises out of an Industrial Commission of Arizona ("ICA") award and decision upon review establishing an average monthly wage. Petitioner, Scott A. Neher ("Claimant"), argues the wage calculated by the administrative law judge ("ALJ") did not "realistically reflect" his average monthly earnings. Because the evidence of record reasonably supports the ALJ's calculation, we affirm.

**JURISDICTION AND STANDARD OF REVIEW**

¶2 This court has jurisdiction pursuant to Arizona Revised Statutes ("A.R.S.") sections 12-120.21(A)(2) (2003) and 23-951(A) (1995), and Arizona Rule of Procedure for Special Actions 10. In reviewing findings and awards of the ICA, we defer to the ALJ's factual findings but review questions of law de novo. *Young v. Indus. Comm'n*, 204 Ariz. 267, 270, ¶ 14, 63 P.3d 298, 301 (App. 2003). We consider the evidence in a light most favorable to upholding the ALJ's award. *Lovitch v. Indus. Comm'n*, 202 Ariz. 102, 105, ¶ 16, 41 P.3d 640, 643 (App. 2002).

**PROCEDURAL AND FACTUAL HISTORY**

¶3 On June 27, 2009, Claimant injured his shoulder unloading heavy job materials while working for the respondent

employer, Gotham Installation, Inc. ("Gotham"), as a lead installer on a job in Houston, Texas. Claimant filed a workers' compensation claim, which the respondent carrier accepted for benefits. Gotham submitted wage information concerning Claimant to the ICA, and the ICA then issued a notice of average monthly wage in the amount of \$2783.75 per month.<sup>1</sup> Claimant timely protested that he had a greater average monthly wage, and the ICA scheduled a hearing on the protest. Before the hearing, the parties filed documentary evidence with the ICA regarding Claimant's wages.

¶4 At the hearing, Claimant explained Gotham built out storefronts and retail spaces for chain stores and banks. Claimant stated he worked for Gotham on an as-needed basis and also for his own construction and remodeling company. He testified he initially worked for Gotham during September, October, and parts of November and December 2008, and then in February 2009 and in June 2009. Depending on the particular job, Gotham paid Claimant between \$25 and \$37.50 per hour. In addition, Gotham paid for hotel, rental vehicle, gasoline,

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<sup>1</sup>The ICA determines and issues the notice of average monthly wage. See A.R.S. § 23-1061(F) (Supp. 2010). Before doing so, the insurance carrier submits a recommended average monthly wage calculation for the employee to the ICA. See, e.g., 8/27/09 Recommended Average Monthly Wage Calculation of Carrier; *Borquez v. Indus. Comm'n*, 171 Ariz. 396, 398-99, 831 P.2d 395, 397-98 (App. 1991).

airfare, driving time, and provided a per diem for what Claimant described as "the cost of being away from home."<sup>2</sup> The parties reduced this information to a spreadsheet and relied on it during the hearing.

¶15 Gotham paid Claimant \$37.50 per hour and \$35 per diem on the Houston job. Claimant flew to Houston on June 19, 2009, and began work the following day. As reflected by earning statements issued by Gotham (or an affiliate) and given to Claimant, Gotham paid Claimant for 46.5 hours of work at \$37.50 per hour, \$70 for drive time, and \$140 of per diem, for total federal taxable wages of \$1813.75 for four work days from June 20, 2009, through June 23, 2009, and then for 40 hours of work at \$37.50 per hour and \$140 of per diem, for total federal taxable wages of \$1500 for seven work days from June 24, 2009, through June 30, 2009 ("second paycheck").<sup>3</sup>

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<sup>2</sup>Claimant testified he was allowed to use the per diem for anything, although he acknowledged the per diem was not included by Gotham in his "pay and not taxed." Gotham's representative, however, described the per diem as a "meal per diem."

<sup>3</sup>Claimant's industrial injury occurred on June 27, 2009. In setting the average monthly wage, wages earned after the date of injury are not considered. For that reason, only a portion of Claimant's earnings from the second paycheck were eligible for consideration in setting the average monthly wage. See A.R.S. § 23-1041(B) (Supp. 2010). According to his time sheet, this was 29 hours at \$37.50 per hour for a total of \$1087.50.

¶16 Claimant testified the second paycheck was short 27.5 hours, which was consistent with his time sheet. Dennis White, Gotham's payroll and finance operations employee, explained Gotham did not have Claimant's time sheet when it issued the second paycheck, but it was aware he was working "a lot of hours." For that reason, Gotham sent Claimant a check for 40 hours so he would receive "some pay" and planned to "adjust for whatever differences there were on the next pay period."

¶17 Claimant testified he had a contractor's license and carried liability insurance but not workers' compensation insurance for his company. Before leaving for Houston, Claimant had worked on a home remodel during April, May, and June 2009, and, in June 2009, had been paid by the client \$3896 on the project.<sup>4</sup>

¶18 White testified Gotham initially hired Claimant on August 25, 2008. From August 25, 2008, through June 26, 2009, Gotham paid Claimant a total of \$24,526.06.<sup>5</sup> White confirmed Gotham paid Claimant \$37.50 per hour on the Houston job and,

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<sup>4</sup>Wages earned for work not covered by workers' compensation insurance are not considered in setting the average monthly wage. *Faulkner v. Indus. Comm'n*, 71 Ariz. 76, 78, 223 P.2d 905, 906 (1950).

<sup>5</sup>This figure is inconsistent with Gotham's Recommended Average Monthly Wage Calculation, which calculated \$24,816.06 as Claimant's gross earnings from August 25, 2008, through June 26, 2009 (earnings paid by Gotham during the year preceding the date of injury).

during the seven days before the industrial injury occurred, Claimant had earned \$2353.75.<sup>6</sup>

¶9 At the conclusion of the hearing, the ALJ authorized the parties to file simultaneous post-hearing memoranda. The ALJ then entered an award adopting Gotham's position and setting Claimant's average monthly wage at \$2437.86 per month. Claimant timely requested administrative review, but the ALJ summarily affirmed her Award. Claimant then filed this special action.

#### DISCUSSION

¶10 Wages earned during the 30 days preceding an industrial injury are the presumptive average monthly wage, but the ALJ has broad discretion to use an expanded wage base when the presumptive base does not realistically reflect a claimant's earnings. See A.R.S. § 23-1041(G) (Supp. 2010); *Davis v. Indus. Comm'n*, 134 Ariz. 293, 296, 655 P.2d 1345, 1348 (App. 1982). Justifications for using an expanded wage base to determine the average monthly wage include: seasonal employment, *intermittent employment*, or inflated wages during the month before the injury. *Elco Veterinary Supply v. Indus. Comm'n*, 137 Ariz. 46, 48, 668 P.2d 889, 891 (App. 1983) (emphasis added).

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<sup>6</sup>This figure is inconsistent with Claimant's time sheets, which reflect earnings of \$2901.25, and Gotham's Recommended Average Monthly Wage Calculation of \$2783.75, which was signed by White. White explained he merely signed a document prepared by Gotham's bookkeeper.

¶11 In *Pena v. Indus. Comm'n*, 140 Ariz. 510, 683 P.2d 309 (App. 1984), this court discussed various average-monthly-wage computations for employees who had been employed less than 30 consecutive days on the date of injury. In *Pena*, the deceased employee had worked for a dairy intermittently over a two-year period. 140 Ariz. at 512, 683 P.2d at 311. At the time of his death, he was performing regular, full-time employment at the dairy. *Id.* But during this final employment, he had worked for less than 30 consecutive days. *Id.* The ALJ calculated the deceased's average monthly wage by determining the deceased's total earnings for all periods of employment during the two-year period and dividing that number by the total number of days the deceased had actually worked at the dairy. *Id.* The ALJ then multiplied that figure by the number of days in a month. *Id.*

¶12 On appeal, this court held the ALJ had used an improper formula in determining the employee's average monthly wage and set aside the award. *Id.* at 515, 683 P.2d at 314. After analyzing Arizona case law adopting different formulas for this calculation, we stated that on remand the ALJ could apply any one of the following formulas if supported by the facts: (1) determination based on "mathematical extrapolation"; (2) determination based on the wages of similar employees doing similar work in the locality; or (3) determination based on all

total wages earned by the claimant while working for the employer in the same job as long as the expanded wage base "reasonably reflects" claimant's earning capacity at the time of the injury. *Id.*

¶13 Here, Claimant worked for Gotham for very short, intense periods between periods of self-employment. Gotham hired him as an installer on August 25, 2008, and he worked steadily for Gotham from approximately September 1, 2008, through November 4, 2008. He next worked for Gotham in February 2009 for several weeks and then not again until June 2009.

¶14 Taking into account the conflicting documents and testimony presented to the ALJ, Claimant earned between \$2353.75 and \$2901.25 during the 30 days before his injury and between \$24,526.06 and \$24,816.06 over the course of his employment with Gotham. The earnings over the course of employment must be divided by the total number of days during the period, 306, and multiplied by the average number of days per month, 30.416. This results in an average monthly wage between \$2437.86 and \$2466.68. Gotham recommended utilizing the calculation with the expanded wage base, over the entire course of Claimant's employment (the third *Pena* formula). Based on Claimant's intermittent employment history, the ALJ adopted Gotham's



position and calculated an average monthly wage of \$2437.86.<sup>7</sup> Although the record contains evidence which would support an alternative calculation, the calculation adopted by the ALJ is supported by the record, and thus, in accord with *Pena* and the discretion it authorizes an ALJ to exercise.

¶15 Finally, we disagree with Claimant's suggestion the ALJ should have included the per diem payments he received from Gotham in determining his average monthly wage. Per diem payments paid by an employer to an employee to reimburse the employee for employment-related expenses "of a nature which would not be incurred but for his employment" are not included in the calculation of average monthly wages. *Moorehead v. Indus. Comm'n*, 17 Ariz. App. 96, 99, 495 P.2d 866, 869 (1972); see also *Lazarus v. Indus. Comm'n*, 190 Ariz. 301, 305, 947 P.2d 875, 879 (App. 1997) (employer-paid health insurance premium not includable in average-monthly-wage calculation; fringe benefit made to secure an employee is different in character and purpose from direct payment to employee made to compensate for work or for work-related expenses).

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<sup>7</sup>This calculation was contained in Gotham's post-hearing memorandum and was adopted by the ALJ in her Award at Finding No. 6. See, e.g., *Hester v. Indus. Comm'n*, 178 Ariz. 587, 589-90, 875 P.2d 820, 822-23 (App. 1993) (ALJ incorporated Claimant's post-hearing memorandum in award).

¶16 For the foregoing reasons, we affirm the award.

/s/

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PATRICIA K. NORRIS, Presiding Judge

CONCURRING:

/s/

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JOHN C. GEMMILL, Judge

/s/

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PATRICIA A. OROZCO, Judge